

# STRICT LIABILITY IN CONTEMPORARY EUROPEAN CODIFICATION: TORN BETWEEN OBJECTS, ACTIVITIES, AND THEIR RISKS

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*Many national legislative frameworks in Europe limit the scope of strict liability to the specific sources of danger listed by statute. This in itself causes disparate treatment of seemingly similar dangers, since legislatively mandated instances cover some inherently dangerous situations but not others. Hence, European scholars call for the introduction of a “general clause” in the area of strict liability. A balance is sought between two opposites: restricting the application of statutory sources of strict liability on the one hand, and allowing unrestricted judicial policymaking to shape strict liability by referring to a “general clause” on the other hand. This Article aims to determine an adequate balance, taking into account fundamental prerequisites such as legal certainty, foreseeability (and therefore insurability), and equal treatment of equal sources of danger. It also addresses the scope of application of such rules. Should they be limited to the pursuit of abnormally dangerous activities, as many drafts propose, or to the control of abnormally hazardous objects? This Article argues that an ideal solution would be based on a legal standard that takes “object” rather than “activity” as the central criterion.*

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I. INTRODUCTION

In many European codifications, strict liability is restrictively applied to the sources of danger listed by the legislature in statutory instances.<sup>1</sup> The fact that courts are sometimes uncomfortable extending the scope of application of these statutory instances often leads to contradictory solutions. This reluctance goes a long way towards explaining scholars’ calls for the introduction of a “general clause” in the area of strict liability to avoid the haphazard way in which strict liability may apply to one case but not to another seemingly similar one.<sup>2</sup> Today, partly as a reaction to this doctrinal call for coherency, various statutory solutions as well as proposals have been suggested to widen the scope of strict liability clauses.

In the current European scholarly debate on drafting satisfactory rules on strict liability, a balance is sought between two opposing extremes: restricting the application of statutory sources of strict liability or using a “general clause” to allow judicial policymaking to shape

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1. For a recent overview and analysis, see CHRISTOPH OERTEL, *OBJEKTIVE HAFTUNG IN EUROPA* [OBJECTIVE LIABILITY IN EUROPE] 49 (2010).

2. See Hein D. Kötz, *Haftung für besondere Gefahr: Generalklausel für die Gefährdungshaftung* [Liability for Special Hazard: General Clause for Strict Liability], 170 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* [ARCHIVE OF CIVIL PRAXIS] 1, 41 (1970); Helmut Koziol, *Umfassende Gefährdungshaftung durch Analogie* [Comprehensive Risk Liability By Analogy], in *FESTSCHRIFT FÜR WALTER WILBURG ZUM 70 GEBURTSTAG* [COMMEMORATIVE PUBLICATION FOR WALTER WILBURG’S 70TH BIRTHDAY] 173, 173 (Hermann Baldt ed., 1975); Pierre Widmer, *Die Vereinheitlichung des schweizerischen Haftpflichtrechts—Brennpunkte eines Projekts* [The Unification of Swiss Liability Laws—Focal Points of a Project], 130 *ZEITSCHRIFT DES BERNISCHEN JURISTENVEREINS* [JOURNAL OF THE BERN LAWYERS’ ASSOCIATION] 385, 405 (1994); GENEVIEVE SCHAMPS, *LA MISE EN DANGER: UN CONCEPT FONDATEUR D’UN PRINCIPE GENERAL DE RESPONSABILITE* [ENDANGERMENT: A FOUNDATIONAL CONCEPT OF A GENERAL PRINCIPLE OF LIABILITY] 843 (1998) (discussing European law). See generally *UNIFICATION OF TORT LAW: STRICT LIABILITY* (B.A. Koch & H. Koziol eds., 2002).

strict liability.<sup>3</sup> This Article aims to determine a preferred balance, taking into account fundamental prerequisites such as legal certainty, foreseeability (and therefore insurability), and equal treatment of equal sources of danger. In doing so, this Article also addresses the scope of application of such rules. Should the rules be limited to the pursuit of abnormally dangerous activities (as many drafts propose) or to the control of abnormally hazardous objects? Since the concept of “activity” may encompass just about any human or professional undertaking, we argue that adopting dangerous activity as the criterion for the general clause would make its scope unpredictable. This Article argues that a preferred legislative framework would take an “object,” rather than “activity,” as the central criterion.

First, the Article briefly introduces the strategies that courts apply when confronted with the statutory limits of strict liability and how such courts may or may not allow a broader scope of strict liability. The Article then focuses on recent drafts and proposals for widening the scope of strict liability through general clauses. We examine whether “activity” can be considered a coherent criterion for the application of a “general clause.” Furthermore, we draw out the difficulties of evaluating and comparing the dangerousness of activities. Finally, the Article presents and supports an alternative approach. By taking “object” rather than “activity” as the central concept for statutory strict liability, it is possible to avoid the pitfalls of the court-centered piecemeal development of such liability. Moreover, this approach may promote coherent, practicable, and sound strict liability policy-making.

## II. CURRENT SOURCES OF STRICT LIABILITY

Many European courts have relaxed the interpretation of the specific statutes without waiting for the legislature’s intervention to allow a broader scope of strict liability.<sup>4</sup> The question is whether this judicial

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3. See MICHAEL R. WILL, QUELLEN ERHÖHTER GEFAHR: RECHTSVERGLEICHENDE UNTERSUCHUNG ZUR WEITERENTWICKLUNG DER DEUTSCHEN GEFÄHRDUNGSHAFTUNG DURCH RICHTERLICHE ANALOGIE ODER DURCH GESETZLICHE GENERALKLAUSEL [SOURCES OF INCREASED RISK: COMPARATIVE LEGAL ANALYSIS OF THE DEVELOPMENT OF GERMAN STRICT LIABILITY THROUGH JUDICIAL OR LEGISLATIVE ANALOGY WITH GENERAL CLAUSE] 277 (1980); Bernhard A. Koch, *Strict Liability*, in PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY 101, 103-04 (European Group on Tort Law ed., 2005); OERTEL, *supra* note 1, at 311.

4. See, e.g., Oberster Gerichtshof [OGH] [Supreme Court] Mar. 28, 1973, docket No. 5 Ob 50/73, 46 ENTSCHIEDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] No. 36, available at Bundeskanzleramt Rechtsinformationssystem [BKA/RIS] <http://www.ris.bka.gv.at/Judikatur/> (Austria). See also Willibald Posch, *Zum Stand der Reform der Gefährdungshaftung:*

intervention solves the problem in such a way that it renders unnecessary a possible legislative implementation of a general clause of strict liability.

A. *Special Legislation*

In many European countries, liability without fault is still limited to specific legislative instruments that provide for narrowly defined, abnormally dangerous activities or objects.<sup>5</sup> The reasons for this are by and large historical. In light of industrial developments at the beginning of the twentieth century, liability for harm caused by activities or objects that present significant residual risk—that is, risk that is not eliminated even when one takes reasonable care—has traditionally been thought of as an exception to generally fault-centered tort law.<sup>6</sup>

Accidents resulting from residual risk are said to be “unavoidable,” in the sense that human agency cannot practicably prevent them. Goods like food, drugs, chemicals, or machines, even when produced under today’s best manufacturing practices (for example, Six Sigma<sup>7</sup>), may present unavoidable defects that could provoke accidents.<sup>8</sup> The legal

*Die Chancen einer “beweglichen” Konzeption der gesetzlichen Neuordnung* [The State of the Reform of Strict Liability: The Chances of a “Flexible” Concept of Legal Reform], in WERTUNG UND INTERESSENAUSGLEICH IM RECHT: WALTER WILBURG ZUM 30 SEPTEMBER 1975 GEWIDMET [ASSESSMENT AND BALANCE OF INTERESTS IN LAW: DEDICATED TO WALTER WILBURG ON SEPTEMBER 30, 1975] 165, 168 (Willibald Posch ed., 1975).

5. See Koch, *supra* note 3, at 103-04; OERTEL, *supra* note 1, at 312.

6. On the subject of fault-centric tort law, see THE DEVELOPMENT OF LIABILITY IN RELATION TO TECHNOLOGICAL CHANGE (Miquel Martín-Casals ed., 2010). In addition, for a discussion of this subject from the point of view of Continental European law, see Daniel Jutras, *Louis and the Mechanical Beast or Josserand’s Contribution to Objective Liability in France*, in TORT THEORY 317 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993). Finally, for a treatment of this topic from the common law point of view, see Lakshman Marasinghe, *Towards a Quasi-Tort in the Common Law*, in TORT THEORY, *supra*, at 342. See also REGINA OGOREK, UNTERSUCHUNGEN ZUR ENTWICKLUNG DER GEFÄHRDUNGSHAFTUNG IM 19 JAHRHUNDERT [STUDIES ON THE DEVELOPMENT OF STRICT LIABILITY IN THE 19TH CENTURY] (1975).

7. See Armin Töpfer & Swen Günther, *Steigerung des Unternehmenswertes durch Null-Fehler-Qualität als strategisches Ziel: Überblick und Einordnung der Beiträge* [Increasing Corporate Value Through Zero-Defect Quality as a Strategic Goal: Overview and Classification of Contributions], in SIX SIGMA: KONZEPTION UND ERFOLGSBEISPIELE FÜR PRAKTIZIERTE NULL-FEHLER-QUALITÄT [SIX SIGMA: CONCEPTS AND EXAMPLES OF SUCCESS FOR PRACTICING ZERO-DEFECT QUALITY] 3 (Armin Töpfer ed., 2007); ROBERT DIRGO, LOOK FORWARD: BEYOND LEAN AND SIX SIGMA: A SELF-PERPETUATING ENTERPRISE IMPROVEMENT METHOD 59 (2005).

8. For an analysis of the concept of “residual risk” in product liability, see ERDEM BÜYÜKSAGIS, LA NOTION DE DÉFAUT DANS LA RESPONSABILITÉ DU FAIT DES PRODUITS: ANALYSE ÉCONOMIQUE ET COMPARATIVE [THE CONCEPT OF DEFECT IN PRODUCT LIABILITY: ECONOMIC AND COMPARATIVE ANALYSIS]

system tolerates a number of activities or objects presenting residual risk insofar as they are deemed necessary for the good of the society.<sup>9</sup> When accidents occur from residual risk, fault-based liability does not allow the compensation and deterrence mechanisms to work. Negligence liability is generally considered to be based on the fundamental idea that the person who creates a risk should be held liable for damage caused by such risk as long as the cost of accident avoidance is less than the losses that might otherwise ensue.<sup>10</sup> Therefore, negligence liability does not aim at eradicating incremental residual risks. At some point, the costs of additional care would outweigh the likely value of the risk avoided. Thus, in order to ensure adequate protection from harm, the legal system may apply strict liability to the person who creates a dangerous situation and who draws financial benefits from it.<sup>11</sup> Therefore, the philosophy behind imposition of strict liability is utilitarian: *ubi emolumentum, ibi onus esse debet* (where one has a right, one must bear its corresponding obligations).

For some authors, the imposition of strict liability also aims to create an incentive for the injurer to avoid accidents that might result from practicing abnormally dangerous activities and using hazardous objects.<sup>12</sup> For others, the strict liability doctrine is largely concerned with correcting substantial imbalances resulting from harm that due care did not prevent.<sup>13</sup> Whatever the justification, the limitations of this approach currently vary from one legal culture to another.<sup>14</sup> That is

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284 (2005) (discussing Swiss, German, French, European, and U.S. law). For a general approach, see DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* 127 (1995).

9. See Israel Gilead, *On the Justifications of Strict Liability*, in *TORT AND INSURANCE LAW YEARBOOK: EUROPEAN TORT LAW 2004*, at 28 (Helmut Koziol & Barbara C. Steininger eds., 2005). The author argues that, "while fault-based liability is liability imposed on *undesirable* conducts, strict liability is perceived as liability which is also imposed on, or 'specializes' in, *desirable* conducts." *Id.* at 29.

10. See Michael Faure, *Economic Analysis of Fault*, in *UNIFICATION OF TORT LAW: FAULT 311, 314* (Pierre Widmer ed., 2005); Pierre Widmer, *Liability Based on Fault*, in *PRINCIPLES OF EUROPEAN TORT LAW: Text and Commentary* 79 (European Group on Tort Law ed., 2005).

11. See Franz Werro et al., *Strict Liability in European Tort Law: An Introduction*, in *THE BOUNDARIES OF STRICT LIABILITY IN EUROPEAN TORT LAW* 3, 18 (Franz Werro & Vernon Valentin Palmer eds., 2004).

12. For a discussion of this concept in U.S. law, see Keith N. Hylton, *The Theory of Tort Doctrine and the Restatement (Third) of Torts*, 54 *VAND. L. REV.* 1413, 1434 (2001).

13. See, e.g., Erwin Deutsch, *Das neue System der Gefährdungshaftungen: Gefährdungshaftung, erweiterte Gefährdungshaftung und Kausal-Vermutungshaftung* [*The New System of Risk Liability: Strict Liability, Absolute Liability, and Advanced Causal Presumption Liability*], 2 *NEUE JURISTISCHE WOCHENSCHRIFT* [NEW LEGAL JOURNAL] 73, 74 (1992).

14. For a comparative overview, see WALTER VAN GERVEN ET AL., *CASES, MATERIAL AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW* 537 (2000).

why it must be emphasized from the outset that there is no European “common core” of legal principles of strict liability.<sup>15</sup>

However, it is also true that in most European countries, enumerated specific statutory provisions entitle victims to compensation simply because they have suffered injury from the exposure to a specific risk.<sup>16</sup> Many European countries, for instance, have adopted strict liability for aircraft owners, nuclear power stations, environmental pollution, railway operators, and car owners and/or keepers.<sup>17</sup>

Although these specific regimes have traditionally been interpreted narrowly, the trend in recent decades has been to depart from the traditional concept of well-delineated strict liability regimes and to extend strict liability beyond its original ambit.<sup>18</sup> Indeed, many courts have relaxed their statutory interpretation as a response to the tension between the statutory constraints and the perceived need to extend strict liability to similar sources of danger.<sup>19</sup>

### B. *Relaxing the Rules to Allow a Broader Scope of Strict Liability*

The rules may be relaxed in several ways to allow a broader scope of strict liability. Austria is one of the few countries that allows extension by analogy beyond the specifically enumerated statutory provisions.<sup>20</sup> In some countries—such as Germany, Switzerland, and Turkey—extension by analogy is seen as the preemption of legislative power and is therefore considered improper.<sup>21</sup> The courts in these countries have developed, in negligence liability, the concept of *Verkehrssicherungspflicht* (duty to maintain safety, i.e., duty of care to protect the public from injuries), which increases the standard of care in such a way that the injurer cannot realistically bring any exculpatory proof.<sup>22</sup> In certain

15. For a comparative and historical analysis, see, e.g., Werro et al., *supra* note 11, at 3; Gerhard Wagner, *Grundstrukturen des Europäischen Deliktsrechts* [*Fundamental Structures of European Tort Law*], in *GRUNDSTRUKTUREN DES EUROPÄISCHEN DELIKTSRECHTS* 189, 270 (Reinhard Zimmermann ed., 2003) (discussing European law); SCHAMPS, *supra* note 2, at 843.

16. See GERT BRÜGGEMEIER, *MODERNISING CIVIL LIABILITY LAW IN EUROPE, CHINA, BRAZIL AND RUSSIA: TEXTS AND COMMENTARIES* 96 (2011).

17. OERTEL, *supra* note 1, at 49.

18. Werro et al., *supra* note 11, at 13; SCHAMPS, *supra* note 2, at 843.

19. See BRÜGGEMEIER, *supra* note 16, at 96.

20. See *id.* at 97; Bernhard A. Koch, *Die österreichische Schadenersatzreform im europäischen Kontext* [*Austrian Compensation Reform in the European Context*], in *FESTSCHRIFT FÜR HELMUT KOZIOL ZUM 70 GEBURTSTAG* [COMMEMORATIVE PUBLICATION FOR HELMUT KOZIOL'S 70TH BIRTHDAY] 721, 736 (Peter Apathy et al. eds., 2010).

21. OERTEL, *supra* note 1, at 49.

22. SCHAMPS, *supra* note 2, at 76, 271.

other countries, particularly in Latin Europe, courts have developed a truly strict liability regime by way of custodian liability.

### 1. By Way of Analogy

The trend of extending the scope of strict liability began in Austria in the early 1950s. Since then, the Austrian Supreme Court (OGH or *Oberster Gerichtshof*) has developed a kind of strict liability particularly for dangerous commercial practices.<sup>23</sup> In a 1973 decision, the OGH clarified the main idea behind this liability as follows:

Austrian law is as little familiar with a general strict liability for the damage caused by an enterprise as with a general vicarious liability of the enterprise for its employees vis-à-vis anyone. However, according to case law the intensified liability of enterprises for specific sources of dangerous activity which the legislature has imposed in particular instances [ . . . ] has to be extended in principle by analogy to all dangerous business activities; whoever runs such an enterprise cannot shift onto the community the danger springing from the nature of the activity which causes damage to body, life and property of others. Instead, he shall be held liable for those even when he or his enterprise auxiliaries cannot be considered to have been negligent.<sup>24</sup>

The danger of running a business as mentioned in the decision may be understood very broadly. In order to establish legal consistency, the OGH limited the scope of strict liability to commercial operations whose activities carry higher risk than the acceptable level based on the frequency of the danger and the gravity of the damage.<sup>25</sup> In a 1971 decision, the OGH stated that “[c]onsideration has to be given not only to the probability of damage occurring as created by the source of danger but also to the danger of the occurrence of extraordinarily serious damage.”<sup>26</sup>

In light of this criterion, the OGH decided that the dangers posed by

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23. See, e.g., OGH Oct. 11, 1995, docket No. 3 Ob 508/93, 7 JURISTISCHE BLÄTTER [JBL] 446 (1996) (Austria).

24. Based on the authors' translation of OGH Mar. 28, 1973, docket No. 5 Ob 50/73, 46 SZ No. 36 (Austria).

25. *Id.*

26. OGH Nov. 30, 1971, docket No. 4 Ob 643/71, 19/20 JBL 539 (1972) (Austria).

the ignition of fireworks,<sup>27</sup> the operation of an ammunition plant or a highly flammable gas factory,<sup>28</sup> a high-tension power cable,<sup>29</sup> a railway in a factory,<sup>30</sup> an industrial railway,<sup>31</sup> a chairlift,<sup>32</sup> and a magnesium ore works<sup>33</sup> were higher than the acceptability threshold. However, according to the OGH, other sources of danger such as the running of a construction business<sup>34</sup> or the operation of a bulldozer<sup>35</sup> remain below the threshold.

## 2. By Way of the Concept of *Verkehrssicherungspflicht*

German courts have been much more reluctant to extend strict liability than those in Austria. For instance, the German Supreme Court (BGH or *Bundesgerichtshof*) refused to apply to water supply installations the same rules enumerated for electricity and gas installations.<sup>36</sup> In deference to a presumed legislative restraint, German courts have consistently refused to extend the special statutory regimes by analogy.<sup>37</sup> The German legal order attaches liability to the tortfeasor's negligent conduct.<sup>38</sup> By way of exception, the legislature has expressly provided for strict liability only in a few exceptional situations where it

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27. OGH Mar. 28, 1973, docket No. 5 Ob 50/73, 46 SZ No. 36 (Austria).

28. OGH Apr. 2, 1952, docket No. 2 Ob 255/52, 25 SZ No. 84 (Austria).

29. OGH Sept. 10, 1947, docket No. 1 Ob 500/47, 21 SZ No. 46 (Austria).

30. OGH Aug. 16, 1949, docket No. 2 Ob 155/49, 22 SZ No. 110 (Austria).

31. OGH Mar. 5, 1958, docket No. 2 Ob 540/57, at BKA/RIS (Austria).

32. OGH Mar. 18, 1953, docket No. 2 Ob 972/52, 26 SZ No. 75 (Austria).

33. OGH Feb. 20, 1958, docket No. 7 Ob 13/58, 31 SZ No. 26 (Austria).

34. OGH June 24, 1964, docket No. 6 Ob 67/64, 37 SZ No. 92 (Austria).

35. OGH Nov. 30, 1971, docket No. 4 Ob 643/71, 19/20 JBl 539 (1972) (Austria).

36. See Bundesgerichtliche [BGH] [Federal Court of Justice] Jan. 25, 1971, 14 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 607, 1971 (Ger.).

37. See Martin Rath, *Der Fall Zeppelin: Steampunks im Reichsgericht* [*The Zeppelin Case: Steampunks in the Imperial Court of Justice*], LEGAL TRIBUNE ONLINE (Apr. 17, 2011), [www.lto.de/recht/feuilleton/f/der-fall-zeppelin-steampunks-im-reichsgericht/](http://www.lto.de/recht/feuilleton/f/der-fall-zeppelin-steampunks-im-reichsgericht/) (referencing Reichsgericht [RG] [former Federal Court of Justice] Jan. 11, 1912, 78 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 171, 1912 (Ger.)); BGH Jan. 25, 1971, 14 NJW 607, 1971 (Ger.). See also KONRAD ZWIEGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG [INTRODUCTION TO COMPARATIVE LAW] 660-61 (1996).

38. See CHRISTIAN VON BAR, VERKEHRSPFLICHTEN: RICHTERLICHE GEFAHRSTEUERUNGSVERBOTE IM DEUTSCHEN DELIKTSRECHT [DUTIES OF CARE: JUDICIAL RISK CONTROL PROHIBITIONS IN GERMAN TORT LAW] 157 (1980). For a more recent study on this topic, see KERSTIN ROHDE, HAFTUNG UND KOMPENSATION BEI STRAßENVERKEHRUNFÄLLEN [LIABILITY AND COMPENSATION IN ROAD ACCIDENTS] 12 (2009).

found a need to make inroads into the negligence principle.<sup>39</sup>

Even though German courts did not anticipate the legislative process in the areas in which strict liability could have been introduced, they have, in negligence liability, developed the concept of *Verkehrssicherungspflicht*, which intensifies the standard of care in certain areas.<sup>40</sup> Architects, for instance, are under a precautionary duty with respect to third persons. The BGH justifies this by stating:

The architect's extra-contractual liability is justified by the fact that he [in part] caused the dangerous condition of the building opened to the public by the owner, [in other words, because] of the poor performance of his own obligations as an architect the building poses a danger to the interests of third parties.<sup>41</sup>

Indeed, in many cases, the concept of *Verkehrssicherungspflicht* transforms liability for negligent conduct into a quasi-strict liability, given the fact that the duty of the defendant to act as a reasonably prudent person is elevated by courts to a duty to act with utmost care.<sup>42</sup>

A similar approach can be seen in other countries where courts are prohibited from extending strict liability by analogy. In Turkey, for example, the Supreme Court (*Yargıtay*) has extended the application of liability for inadequate maintenance of constructions to accommodate the perceived need for compensation.<sup>43</sup> For instance, in a case where an eight-year-old boy was electrocuted when trying to retrieve his kite, which was stuck on top of an electricity pole, the *Yargıtay* held the electricity distribution company liable on the basis of inadequate maintenance resulting from the absence of a warning sign on the

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39. See Bürgerliches Gesetzbuch [BGB] [Civil Code] § 832 (liability for damage caused by others); *id.* §§ 833-834 (liability for damage inflicted by an animal); *id.* § 836 (liability for damage caused by a collapsing building).

40. See, e.g., REINHART GEIGEL, DER HAFTPFLICHTPROZESS [THE LIABILITY SUIT] 445 (2011); HEIN KÖTZ & GERHARD WAGNER, DELIKTSRECHT [TORT] 75 (2010); BASIL MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE 86 (2002); Jörg Fedtke & Ulrich Magnus, Germany, in UNIFICATION OF TORT LAW: STRICT LIABILITY 147, 148 (B.A. Koch & H. Koziol eds., 2002).

41. Based on the authors' translation of BHG Oct. 28, 1986, 17 NJW 1013, 1987 (Ger.).

42. See Werro et al., *supra* note 11, at 409.

43. Erdem Büyüksagis, *The New Turkish Tort Law*, 3 J. EUR. TORT L. 44, 67 (2012).

pole.<sup>44</sup> Moreover, in the absence of a special rule of strict liability, Turkish courts have imposed a heightened duty to avoid harm on enterprises that run dangerous commercial operations.<sup>45</sup> For example, the *Yargıtay* held the owners of mobile telephone base transceiver stations liable, qualifying their activities as abnormally dangerous for inhabitants living nearby, even if no harm had yet occurred.<sup>46</sup>

In Switzerland, plaintiffs base their claims on a violation of *Gefahrensatz* (a jurisprudential rule which forbids the creation of an undue risk) designed for enterprises, thus avoiding having to prove any fault on the part of the company or its employees.<sup>47</sup> According to Article 55 of the Swiss Code of Obligations (SwCO or *Schweizerisches Obligationenrecht*),<sup>48</sup> an employer is held liable for the harm caused by his employees or other auxiliary persons in the course of performing their employment or business activities. The employer may be exonerated from his or her liability if he or she proves that he or she has taken all precautionary measures appropriate under the circumstances to prevent the harm or that the injuries would have occurred despite such precautions.<sup>49</sup> However, the Swiss Federal Supreme Court (*Schweizerisches Bundesgericht*) applies the exoneration clause so narrowly that the employer typically cannot meet the burden of proof.<sup>50</sup> To escape liability under Article 55 of the SwCO, the employer must prove that he or she has

44. Yargıtay Hukuk Genel Kurulu [YHGK] [Supreme Court, Grand Civil Chamber] Mar. 12, 2003, main No. 2003/4-144, decision No. 2003/161, *available at* <http://www.kararevi.com/karars/56455#.USVFEFrwLIL> (Turk.).

45. *See* Büyüksagis, *supra* note 43, at 68.

46. *See* Yargıtay 4. Hukuk Dairesi [Supreme Court, 4th Civil Chamber] Jan. 29, 2004, main No. 2003/16434, decision No. 2004/971, *available at* <http://www.tuketicihaklari.org.tr/haber/7> (Turk.).

47. *See* PIERRE WIDMER & PIERRE WESSNER, REVISION UND VEREINHEITLICHUNG DES HAFTPFLICHTRECHTS: ERLÄUTERNDER BERICHT [REVISION AND STANDARDIZATION OF LIABILITY LAW: EXPLANATORY REPORT] 14 (2000), *available at* <http://www.bfm.admin.ch/content/dam/data/wirtschaft/gesetzgebung/haftpflicht/vn-ber-d.pdf>.

48. OBLIGATIONENRECHT [OR] [CODE OF OBLIGATIONS] Mar. 30, 1911, AS 27 317 (1912), art. 55 (federal law on the amendment of the Swiss Civil Code (Part Five: Code of Obligations)) (Switz.).

49. *See* FRANZ WERRO, LA RESPONSABILITÉ CIVILE [CIVIL RESPONSIBILITY] 137 (2d ed., 2011); GORDON AESCHIMANN, LA RESPONSABILITÉ CIVILE DU FAIT DE L'ORGANISATION: DROIT ET SOCIÉTÉ [THE CIVIL LIABILITY OF THE ORGANIZATION: LAW AND SOCIETY] 15 (2010).

50. *See* Bundesgericht [BGer] [Federal Supreme Court] Oct. 9, 1984, 110 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTES [BGE] II 456, ¶¶ 2, 3 (Switz.); *see also* PIERRE WIDMER, PRODUKTEHAFTUNG: URTEILSANMERKUNG ZIVILRECHT [PRODUCT LIABILITY: CIVIL LAW JUDGMENTS] 50 (1986).

taken any reasonable measure that, from an objective perspective and with the highest degree of probability, is deemed likely to avoid the accident.<sup>51</sup> As a result of this high evidentiary barrier, fault-based liability gravitates toward strict liability for *Gefahrensatz*.<sup>52</sup>

This high barrier is especially pertinent in product liability cases. Swiss courts examine whether the employer has organized his business in such a way that an adequate final control of product safety would be able to detect all possible defects that may occur during manufacturing, even though, practically speaking, some defects linked to manufacturing are simply unavoidable even with reasonable care.<sup>53</sup>

### 3. By Way of Custodian Liability

For harm resulting from a dangerous activity not mentioned in any legal text, some courts start from an *ex post* perspective by creating a new standard condemning that activity as being against good faith, so that the judge can take note of a wrongfulness that allows the perpetrator to be held liable.<sup>54</sup> In France, for instance, the scope of strict liability has in practice become larger than that of fault-based liability, a characteristic nonexistent in other European law systems.<sup>55</sup>

That particular case law has been developed mainly through the well-known *Jand'heur* decision of the French Supreme Civil Court (*Cour de Cassation Française*).<sup>56</sup> The court in that case held that Article 1384(1) of the French Civil Code (FrCC or *Code Civil Français*) contains a general strict liability for all harm caused by an object.<sup>57</sup> The guardian

51. See WERRO, *supra* note 49, at 146.

52. See Pierre Widmer, *Ex Nihilo Responsabilitas Fit, or the Miracles of Legal Metaphysics*, 2 J. EUR. TORT L. 135, 142 (2011); AESCHIMANN, *supra* note 49, at 16.

53. See Erdem Büyüksagis, *La relativité de la sécurité du produit: différentes circonstances, différents défauts, différents régimes de responsabilité* [The Relativity of Product Safety: Different Circumstances, Different Defects, Different Liability Regimes], 129 REVUE DE DROIT SUISSE [SWISS LAW REVIEW] 29, 46 (2010) (discussing Swiss and European law).

54. See Martijn W. Hesselink, *The Concept of Good Faith*, in TOWARDS A EUROPEAN CIVIL CODE 619, 645 (Arthur S. Hartkamp et al. eds., 2011) (“Good faith is not the highest norm of contract law or even of private law, but no norm at all, and is merely the mouthpiece through which new rules speak, or the cradle where new rules are born. What the judge really does when he applies good faith is to create new rules.”); see also WIDMER & WESSNER, *supra* note 47, at 124.

55. For a comparative analysis which underlines the different character of French law, see Franz Werro, *Liability for Harm Caused By Things*, in TOWARDS A EUROPEAN CIVIL CODE 921, 926 (A. Hartkamp et al. eds., 2011).

56. See Cour de cassation [Cass.] [supreme court for judicial matters] ch. réun. Feb. 13, 1930, D.P. 1930 I 57, at 121-23 (*Jand'heur c. Les Galeries belfortaises*) (Fr.).

57. See PHILIPPE MALAURIE ET AL., LES OBLIGATIONS 92 (2009).

of the object cannot escape liability by proving that the damage was caused by force majeure.<sup>58</sup> In other words, the liability applies even though the potential injurer could not have avoided the accident. Thus, *Jand'heur* fundamentally changed the foundation of Article 1384 of the FrCC, which states that “a person is liable not only for the damages he causes by his own act, but also for that which is caused . . . by things which are in his custody,” into a mandate of strict liability for the keeper of things.<sup>59</sup>

The evolution of strict liability in France played a role in the development of the strict liability laws of neighboring countries such as Belgium, Italy, and Portugal.<sup>60</sup> In Belgium, in addition to the specific instances of strict liability, Article 1384(1) of the Belgian Civil Code (BeCC or *Code Civil Belge*) provides that the guardian of defective property is liable for the harm caused by that property’s particular defect.<sup>61</sup> Since the defectiveness is a condition of the liability, one could argue that the Belgian liability for tangible objects is less strict than in France<sup>62</sup> and closer to European product liability. However, in practice, Belgian courts have widened the scope of this liability by assuming that a defect is present as soon as there is an abnormal feature that can be deemed to have caused damage.<sup>63</sup> Even if the owner has nothing to do with the accident, he or she is liable along with the holder or leaseholder.<sup>64</sup>

In Italy, Article 2051 of the Italian Civil Code (ItCC or *Codice Civile Italiano*) provides that “every person is responsible for damage caused by things under his custody, unless the latter proves the occurrence of a fortuitous event.”<sup>65</sup> This provision originally covered only accidents

58. See Wertó, *supra* note 55, at 928-29.

59. See MALAURIE ET AL., *supra* note 57, at 92.

60. See OERTEL, *supra* note 1, at 246.

61. See Cour de Cassation [Cass.] [Court of Cassation] 1ère ch. Oct. 6, 1961, REVUE CRITIQUE DE JURISPRUDENCE BELGE [RCJB] 1963, 5 (Belg.); Cass. 1ère ch., Feb. 12, 1976, PASICRISE BELGE [PAS.] 1976, 652 (Belg.).

62. See, e.g., Jean-Sébastien Borghetti, *La responsabilité du fait des choses, un régime qui a fait son temps* [Liability for the Acts of Things, A System That Has Outlived Its Usefulness], REVUE TRIMESTRIELLE DE DROIT CIVILE [QUARTERLY CIVIL LAW REVIEW] 1 (2010).

63. See, e.g., DETERRENCE, INSURABILITY, AND COMPENSATION IN ENVIRONMENTAL LIABILITY: FUTURE DEVELOPMENTS IN THE EUROPEAN UNION 75 (Michael Faure ed., 2003) (describing Rechtbank van Koophandel [Kh.] [Commerce Tribunal] Sint Niklaas, Dec. 2, 1958, RECHTSKUNDIG WEEKBLAD [RW] 1959-1960, 1904 (Belg.)).

64. For these developments, see THIERRY VANSWEEVELT & BRITT WEYTS, HANDBOEK BUITENCONTRACTUEEL AANSPRAKELIJKHEIDSRICHT [MANUAL OF EXTRA CONTRACTUAL LIABILITY] 453 (2009).

65. Codice civile [C.c.] [Civil Code] art. 2051 (It.).

caused by the condition of the thing or by the realization of a risk typically associated with its use.<sup>66</sup> In such cases, the fault of the guardian is presumed.<sup>67</sup> At first glance, this liability seems less strict than that imposed by the French courts. Nevertheless, Italian courts interpret this “intensified liability for fault” in such a way that the custodian cannot be exonerated from the liability unless he proves a *caso fortuito* (act of god) to be the cause of the harm.<sup>68</sup> This interpretation brings the Italian strict liability for things close to the French and Belgian approach.

In Portugal, Article 493 of the Portuguese Civil Code (PoCC or *Código Civil Português*) provides that fault is presumed if there is a duty to supervise a movable or immovable thing.<sup>69</sup> Today, the Portuguese courts’ interpretation of this disposition makes it difficult for a custodian to exonerate himself from his liability.<sup>70</sup> The only way for the custodian to be exculpated is to prove that he has taken all necessary measures to avoid the realization of harm.<sup>71</sup> In reality, this doctrine imposes a duty of care that might be more stringent than what “reasonable care” would otherwise require, because the liability is based on the argument that the defect could have been prevented if the custodian had sufficient control of the dangerous thing.<sup>72</sup> Consequently, even though it permits circumstantial proof of negligence, in a similar way to French, Belgian, and Italian case law, a custodian’s liability in practice frequently amounts to strict liability.

### C. Problem of Legal Uncertainty

The solutions developed by different European courts narrow the gap between the tort law systems of these countries and those legal

66. See Cass., 28 ottobre 1995 [Oct. 28, 1995], n. 11264, Giust. Civ. 1995, III, 1800, 1804-05 (It.); see also Michele Fornaciari, *La responsabilità da cose in custodia [Liability for Things in Custody]*, 59 GIUSTIZIA CIVILE [CIVIL JUSTICE] 297 (2009); FRANCESCO GAZZONI, *MANUALE DI DIRITTO PRIVATE [MANUAL OF PRIVATE LAW]* 706 (11th ed. 2003).

67. See LORENZO MEZZASOMA, *IL DANNO DA COSE NEGLI ORDINAMENTI ITALIANO E SPAGNOLO [DAMAGE TO THINGS UNDER THE LAWS OF ITALY AND SPAIN]* 245 (2001).

68. See MASSIMO FRANZONI, *L'ILLECITO [ABUSE]* 504-17 (2d ed., 2010); Marco Comporti, *Fatti illeciti: le responsabilità oggettive [Torts: Objective Responsibility]*, in *IL CODICE CIVILE: COMMENTARIO [CIVIL CODE: COMMENTARY]* 294, 294-98 (Francesco D. Busnelli ed., 2009).

69. *CÓDIGO CIVIL [PoCC] [Civil Code]* arti. 493 (Port.).

70. See Jorge Sinde Monteiro & Maria Manuel Veloso, *Fault Under Portuguese Law, in UNIFICATION OF TORT LAW: FAULT*, *supra* note 10, 180, 181.

71. See André Dias Pereira, *Portuguese Tort Law: A Comparison With the Principles of European Tort Law, in EUROPEAN TORT LAW 2004*, *supra* note 9, 623, 636-37.

72. Monteiro & Veloso, *supra* note 70, at 181.

systems that are more willing to extend strict liability.<sup>73</sup> Despite this, the problem of unequal treatment of the victims of similar accidents resulting from similarly abnormally dangerous activities or objects will not be solved<sup>74</sup> unless courts consider extending strict liability by analogy beyond the specifically enumerated statutory provisions, as they do in Austria.

For instance, the Geneva Court of Justice in Switzerland refused to make the analogy between a car accident (which, according to a special law, is an instance in which strict liability must be applied) and a motorboat accident, because there is no special law in Switzerland for this type of vehicle.<sup>75</sup> The obvious question is why the car owner is required to pay for owning a dangerous object or for a dangerous activity he undertakes, and thus to compensate for the harm he causes,<sup>76</sup> whereas the motorboat owner is not.<sup>77</sup> The Austrian approach here would question whether liability should not be based upon a policy that holds liable anyone who, for his own purposes, creates an abnormal risk of harm to others.

The need to judge similar cases in a like manner generated a doctrinal debate about adopting a general clause on strict liability instead of regulating different cases according to diverse statutory instances.<sup>78</sup> Many European scholars believe that such a solution would eliminate the legal uncertainty that results from discrimination between the victims of relatively similar accidents.<sup>79</sup> However, the determination of the potential danger that is intended to be covered by such a

73. See generally Werro, *supra* note 55, at 924; BRÜGGEMEIER, *supra* note 16, at 98-99.

74. See Heinrich Honsell, *Die Reform der Gefährdungshaftung* [The Reform of Strict Liability], 1997 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT [JOURNAL OF SWISS LAW] 297, 308; Beat Schönenberger, *Generalklausel für die Gefährdungshaftung—ein sinnvolles Reformvorhaben?* [General Clause of Strict Liability—A Meaningful Reform Project?], in RISIKO UND RECHT: FESTGABE ZUM SCHWEIZERISCHEM JURISTENTAG 2004 [RISK AND JUSTICE: COMMEMORATIVE PUBLICATION FOR SWISS LAWYERS 2004], at 171, 188-89 (Thomas Sutter-Somm et al. eds., 2004).

75. See Cour de justice, chambre civile [court of justice, civil division] Apr. 24, 1998, 1999 LA SEMAINE JUDICIAIRE [SJ] I 11 (Switz.). For a similar decision in Austrian case law, see OGH June 27, 1968, docket No. 1 Ob 151/68, 41 SZ No. 84, 282-83.

76. See BGer Mar. 16, 1967, 93 BGE II 111, ¶ 8a (Switz.).

77. See Pierre Widmer, *Liability for Damage Caused by Others Under Swiss Law*, in UNIFICATION OF TORT LAW: LIABILITY FOR DAMAGE CAUSED BY OTHERS 275, 276 (Jaap Spier ed., 2003).

78. Kötz, *supra* note 2, at 41; Koziol, *supra* note 2, at 173; Widmer, *supra* note 2, at 405; SCHAMPS, *supra* note 2, at 843. See generally UNIFICATION OF TORT LAW: STRICT LIABILITY, *supra* note 2.

79. For references and an overview of arguments pro and contra, see OERTEL, *supra* note 1, at 311; Willem H. van Boom & Andrea Pinna, *Le droit de la responsabilité civile de demain en Europe: Questions choisies* [The Law of the Civil Liability of Tomorrow in Europe: Selected Issues], in LA RESPONSABILITÉ CIVILE EUROPÉENNE DE DEMAIN: PROJETS DE RÉVISION NATIONAUX ET PRINCIPES

clause is not an easy task. Thus, although most countries have accepted the idea of a general clause, the elements to include in such a concept are still under debate.<sup>80</sup>

### III. VARIED PERSPECTIVES

Dutch lawmakers, as well as the board of the Study Group on a European Civil Code, chose to adopt the “control of dangerous things” criterion as the basis for strict liability,<sup>81</sup> whereas Italian, Portuguese, and Turkish lawmakers, as well as the European Group on Tort Law and the French and Swiss project drafters, decided to rely on the “practice of a dangerous activity” criterion.<sup>82</sup>

#### A. “Control of Dangerous Objects” As a Criterion

The common point of all the European strict liability legal systems that take “control of dangerous things” as a criterion is that, despite some critiques on possible application complications, they make a distinction between dangerous and non-dangerous or more dangerous and less dangerous objects.<sup>83</sup> From the perspective of a possible European codification, the Draft Common Frame of Reference (DCFR) reflects this idea in Article VI-3:206.<sup>84</sup> The general clause on risk

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EUROPÉENS [EUROPEAN CIVIL LIABILITY OF TOMORROW: NATIONAL REVISION PROJECTS AND EUROPEAN PRINCIPLES] 261, 267 (Bénédict Winiger ed., 2008); KOTZ & WAGNER, *supra* note 23, at 202-03.

80. For a more recent discussion, see Werro, *supra* note 55, at 921.

81. *See infra* III.A.

82. *See infra* III.B.

83. *See, e.g.*, Koch, *supra* note 3, at 102 (arguing that French law, which takes control of dangerous things as a criterion, “introduces quite significant uncertainty as to the scope of strict liability”).

84. *See Non-Contractual Liability Arising Out of Damage Caused to Another*, in PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (INTERIM OUTLINE EDITION) 301, 310-11 (Christian von Bar et al. eds., 2008) [hereinafter DCFR]. Article VI-3:206 (Accountability for damage caused by dangerous substances or emissions) provides that:

- (1) A keeper of a substance or an operator of an installation is accountable for the causation by that substance or by emissions from that installation of personal injury and consequential loss, loss within [Article] VI-2:202 (Loss suffered by third persons as a result of another’s personal injury or death), loss resulting from property damage, and burdens within [Article] VI-2:209 (Burdens incurred by the State upon environmental impairment), if:
  - (a) having regard to their quantity and attributes, at the time of the emission, or, failing an emission, at the time of contact with the substance it is very likely that the substance or emission will cause such

liability provides that the keeper of substances such as chemicals and the operator of an installation are liable for personal injury, property loss, and consequential loss caused by that substance or emissions from the installation.<sup>85</sup> The liability depends on whether it is very likely that the substance or emission will cause such damage unless adequately controlled.<sup>86</sup>

According to Article VI-3:206 of the DCFR, the principle under which the general clause on strict liability operates is not the control of a hazardous activity but the control of hazardous substances or emissions.<sup>87</sup> Hence, the person who exercises control over a substance or an installation and uses it within the framework of a lucrative activity is responsible for the personal injuries and losses caused by this substance or the emissions of this installation if it is highly probable that, given their quantity and characteristics, the substance or the emissions may create a danger exceeding the acceptability threshold.<sup>88</sup> With such a formulation, the DCFR intends to apply the principle of strict liability to any activity requiring the use of substances, instruments, installations, or energies that render such an activity dangerous, provided that the keeper exercises control over them for his or her trade, business, or profession.<sup>89</sup>

This solution calls to mind the general liability for things stated by

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damage unless adequately controlled; and

(b) the damage results from the realisation of that danger.

(2) "Substance" includes chemicals (whether solid, liquid or gaseous). Microorganisms are to be treated like substances.

(3) "Emission" includes:

(a) the release or escape of substances;

(b) the conduction of electricity;

(c) heat, light and other radiation;

(d) noise and other vibrations; and

(e) other incorporeal impact on the environment.

(4) "Installation" includes a mobile installation and an installation under construction or not in use.

(5) However, a person is not accountable for the causation of damage under this Article if that person:

(a) does not keep the substance or operate the installation for purposes related to that person's trade, business or profession; or

(b) shows that there was no failure to comply with statutory standards of control of the substance or management of the installation.

85. *Id.* at 310 (Article VI-3:206(1)).

86. *Id.* (Article VI-3:206(1)(a)).

87. *Id.*

88. *Id.*

89. *Id.* (Article VI-3:206(5)(a)).

Article 1384(1) of the FrCC, according to which an individual is liable not only for the damage he causes by his own act (*responsabilité du fait personnel*) but also for that caused by the acts of things in his charge (*responsabilité du fait des choses*).<sup>90</sup> However, the provision of the DCFR differs from that of the FrCC examined above. Indeed, the presumption of liability established by the French disposition can be removed only when it is proven that the damage results from a foreign cause that cannot be attributed to the object itself (act of god).<sup>91</sup> However, Article VI-3:206(5b) of the DCFR allows the keeper of a dangerous substance to release himself from liability if he proves that he has complied “with statutory standards of control of the substance or management of the installation.”<sup>92</sup> Thus, providing a cause of attenuation, Article VI-3:206(5b) of the DCFR establishes a liability that is less severe than the one created by Article 1384(1) of the FrCC. In fact, as Professor Werro points out, what the DCFR provides is a system of liability based on an assumed fault related to the control of a dangerous substance or emission.<sup>93</sup> The French Supreme Court has established truly strict custodial liability applicable to all kind of dangerous objects (even grills<sup>94</sup> and mail boxes<sup>95</sup>) except those subject to a special regime, such as buildings or cars.<sup>96</sup>

Dutch law also makes provisions for liability without fault for dangerous things. Article 6:173 of the Dutch Civil Code (BW or *Burgerlijk Wetboek*) applies to movable objects while Article 6:174 of the BW applies to buildings if they present a particular danger for persons and

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90. See LOUIS JOSSEMAND, DE LA RESPONSABILITÉ DU FAIT DES CHOSES INANIMÉES [OF LIABILITY FOR INANIMATE OBJECTS] 106 (1897); M. André Tunc, *Rapport sur les Choses Dangereuses et la Responsabilité Civile en Droit Français* [Report on Dangerous Things and Liability in French Law], in LES CHOSES DANGEREUSES [DANGEROUS THINGS] 50, 50-51 (Association Henri Capitant des Amis de la Culture Juridique Française ed., 1971).

91. See GENEVIÈVE VINEY & PATRICE JOURDAIN, TRAITÉ DE DROIT CIVIL: LES CONDITIONS DE LA RESPONSABILITÉ § 391 (3d ed. 2006); WERRO, *supra* note 55, at 923.

92. DCFR, *supra* note 84, at 311 (Article VI-3:206(5)(b)).

93. WERRO, *supra* note 55, at 942; see also PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE 3543 (Christian von Bar et al. eds., 2010), available at [http://ec.europa.eu/justice/contract/files/european-private-law\\_en.pdf](http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf).

94. See Cass. 2e civ., Feb. 24, 2005, docket No. 03-17.190, available at [legimobile.fr/fr/jp/j/c/civ/2eme/2005/2/24/03-17190/](http://legimobile.fr/fr/jp/j/c/civ/2eme/2005/2/24/03-17190/) (Fr.).

95. See Cass. 2e civ., Oct. 25, 2001, docket No. 99-21.616, Bull. civ. II, No. 103 (Fr.); Cass. 2e civ., Oct. 25, 2001, docket No. 99-21.616, D. 2002 Somm. 1450-51, note Prat (Fr.).

96. See generally VINEY & JOURDAIN, *supra* note 91, § 679; WERRO, *supra* note 55, at 928.

things.<sup>97</sup> At first glance, these dispositions give the impression that the Dutch legislature wanted to extend the scope of strict liability to all dangerous objects not covered by special rules, such as those for animals, motor vehicles, vessels, and aircraft.<sup>98</sup> In fact, the ambit of the Dutch dispositions is not that large. Indeed, these dispositions apply only to objects that do not meet reasonable safety standards.<sup>99</sup> Hence, the victim must argue that the object was defective. This may also include cases of unreasonably unsafe design. Abnormally hazardous objects, if they do not present a particular danger resulting from a defective condition, are not subjected to the application of strict liability, unless they enter into the scope of Article 6:175 of the BW.<sup>100</sup> According to that Article, a person who uses or possesses a particularly dangerous substance within the framework of his business is liable for the harm caused by this substance.<sup>101</sup> In Dutch law, explosive, inflammable, or poisonous substances are considered particularly dangerous.<sup>102</sup>

Compared to Article 1384(1) of the FrCC, the scope of the Dutch strict liability for dangerous things under Article 6:173 of the BW seems narrow, since it requires that the dangerous character of the object results from its defectiveness, which must be shown by the plaintiff.<sup>103</sup> According to the FrCC, the defendant is liable not because of the nature of the thing (which may or may not be defective), but because he is its keeper (*gardian*).<sup>104</sup> On the other hand, in Dutch practice, the fact that the victim has the burden of proving the defectiveness does not lessen the strict character of the liability.<sup>105</sup> The application of *res ipsa loquitur* has assuaged the relative hardships of this burden.<sup>106</sup>

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97. See Burgerlijk Wetboek [BW] [Civil Code] arts. 6:173-6:174; Edgar du Perron & Willem H. van Boom, *Netherlands, in UNIFICATION OF TORT LAW: STRICT LIABILITY* 227, 227-55 (B.A. Koch & H. Koziol eds., 2002).

98. BW art. 6:173(3).

99. HR 17 december 2010 [Dec. 17, 2010], RvdW 2011, 7 m.nt. (Neth.); HR 20 oktober 2000 [Oct. 20, 2000], NJ 2000, 700 m.nt. (Neth.).

100. JAAP SPIER ET AL., *VERBINTENISSEN UIT DE WET EN SCHADEVERGOEDING [OBLIGATIONS ARISING FROM STATUTE AND COMPENSATION]* 120-21 (2012).

101. Du Perron & van Boom, *supra* note 97, at 227.

102. See Ingrid Greveling & Willem H. van Boom, *The Netherlands, in DAMAGE CAUSED BY GENETICALLY MODIFIED ORGANISMS* 403, 414 (Bernhard A. Koch ed., 2010).

103. SPIER ET AL., *supra* note 100, at 113.

104. CODE CIVIL [C. CIV.] art. 1384 (Fr.).

105. CHRISTIAAN J. VAN ZEBEN & J. W. DU PON, *PARLEMENTAIRE GESCHIEDENIS VAN HET NIEUWE BURGERLIJKE WETBOEK, BOEK 6, ALGEMEEN GEDEELTE VAN HET VERBINTENISSENRECHT* 755 (1981).

106. *Id.*

B. “Practicing a Dangerous Activity” As a Criterion

In Europe, the drafters of the Principles of European Tort Law (PETL) preferred to base the general clause of strict liability on “the practice of a dangerous activity” criterion rather than on “the control of dangerous things” criterion.<sup>107</sup> According to Article 5:101 of the PETL:

A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it.

An activity is abnormally dangerous if it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and it is not a matter of common usage.<sup>108</sup>

This disposition gives the impression that it leans heavily on § 20 (Abnormally Dangerous Activities) of the U.S. *Restatement (Third) of Torts*, which establishes strict liability for abnormally dangerous activities. The *Restatement* § 20 also defines an abnormally dangerous activity as follows: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors, and (2) the activity is not a matter of common usage.<sup>109</sup>

Such a formulation raises many questions, particularly regarding the definition of a highly significant and foreseeable risk and the scope of activities of common usage. In the United States, these questions can be clarified to some extent by established case law.<sup>110</sup> In Europe, however, there is no common law tradition on which civil courts can

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107. Koch, *supra* note 3, at 104.

108. PRINCIPLES OF EUROPEAN TORT LAW art. 5:101 (2005).

109. RESTATEMENT (THIRD) TORTS § 20 (2010).

110. *See, e.g.*, Yukon Equip. v. Fireman’s Fund Ins. Co., 585 P.2d 1206 (Alaska 1978); Zero Wholesale Gas Co. v. Stroud, 571 S.W.2d 74 (Ark. 1978); Luthringer v. Moore, 190 P.2d 1 (Cal. 1948); Green v. Gen. Petroleum Corp., 270 P. 952 (Cal. 1928); Smith v. Lockheed Propulsion Co., 56 Cal. Rptr 128 (Cal. Ct. App. 1967); Caporale v. C.W. Blakeslee & Sons, Inc., 175 A.2d 561 (Conn. 1961); Old Island Fumigation, Inc. v. Barbee, 604 So.2d 1246 (Fla. Dist. Ct. App. 1992); Nat’l Steel Serv. Ctr., Inc. v. Gibbons, 319 N.W.2d 269 (Iowa 1982); Spano v. Perini Corp., 250 N.E.2d 31 (N.Y. 1969); Valentine v. Pioneer Chlor Alkali Co., 864 P.2d 295 (Nev. 1993); Loe v. Lenhardt, 362 P.2d 312 (Or. 1961); Vern J. Oha & Assocs. v. Washington Park Towers, Inc., 569 P.2d 1141 (Wash. 1977); Langan v. Valicopters, Inc., 567 P.2d 218 (Wash. 1977); Siegler v. Kuhlman, 502 P.2d 1181 (Wash. 1972).

fall back.<sup>111</sup> Therefore, there is no guiding principle common to all member states. National legislations give considerable scope to the judges' discretionary power on these issues, which has resulted in a wide variation of strict liability in Europe.<sup>112</sup>

According to Article 2050 of the ItCC and Article 493 of the PoCC, for instance, a person is liable if he causes damage to another person by "carrying out an activity dangerous in itself or because of the means employed or of the objective conditions in which the activity was carried out."<sup>113</sup> Pursuant to Article 2050 of the ItCC, a person can avoid liability only by proving that he has taken "all measures appropriate for the avoidance of damage" or "all precautions required by the circumstances."<sup>114</sup> Courts consider storing personal data as a dangerous activity, whereas, according to them, a bank's use of counters and ATMs is not, even though it creates opportunities for criminals to cause harm to third parties.<sup>115</sup> On the basis of Article 493 of the PoCC, supplying water was not considered a dangerous activity.<sup>116</sup> Therefore, when a water main burst in Portugal and damaged a photocopier, its owner had to prove the water supplier's fault, since the rules in building liability cannot be applied.<sup>117</sup> Portuguese case law suggests that, today, the owner would not bear the burden of proving the

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111. See Willem H. van Boom, *Torts, Courts, and Legislatures—Comparative Remarks on Civil Law Codifications of Tort Law*, in *TORT LAW AND THE LEGISLATURE: COMMON LAW, STATUTE AND THE DYNAMICS OF LEGAL CHANGE* 17, 17-30 (T.T. Arvind & J. Steele eds., 2012).

112. CHRISTIAN VON BAR, *GEMEINEURÖPÄISCHES DELIKTSRECHT, VOL. II: SCHADEN UND SCHADENSERSATZ, HAFTUNG FÜR UND OHNE EIGENES FEHLVERHALTEN, KAUSALITÄT UND VERTEIDIGUNGSGRÜNDE* [THE COMMON EUROPEAN LAW OF TORTS, VOL. II: DAMAGE AND DAMAGES, LIABILITY FOR AND WITHOUT PERSONAL MISCONDUCT, CAUSALITY, AND DEFENCES] 329 (1999) (discussing European law).

113. See CODICE CIVILE [C.c.] art. 2050 (It.); CODIGO CIVIL art. 493 (Port.).

114. See Cass., 19 luglio 2002 [July 19, 2002], n. 10551, 52 Giust. Civ. 2002, III, 1276, 1283 (It.) ("This court holds that air navigation cannot be considered *per se* a dangerous activity, thereby excluding applicability of Article 2050 of the Italian Civil Code, however, in actual fact, this element of dangerousness arises each time the said activity is not carried out according to its normal and specific conditions, that is, not in compliance with flight plans, in conditions of safety, in normal atmospheric conditions; Article 2050 would be therefore applicable whenever air navigation fails to be carried out in conditions of safety or when the conditions in which it is carried out are irregular.") (authors' translation).

115. See WILLEM H. VAN BOOM, *Some Remarks on the Decline of Rylands v. Fletcher and the Disparity of European Strict Liability Regimes*, in *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* [JOURNAL OF EUROPEAN PRIVATE LAW] 618-37 (2005).

116. See CHRISTIAN VON BAR, *THE COMMON EUROPEAN LAW OF TORTS, VOL. II: DAMAGE AND DAMAGES, LIABILITY FOR AND WITHOUT PERSONAL MISCONDUCT, CAUSALITY, AND DEFENCES* 379 (2005) (citing S.T.J., Apr. 4, 1996, CJ (ST) IV (1996-3) 122 (Port.)).

117. *Id.*

supplier's fault.<sup>118</sup>

To avoid possible complications related to the definition of notions like "foreseeable risk" or "common usage activity," Turkish lawmakers as well as the drafters of the French Reform of Law of Obligations (FrRLO) and the Swiss project drafters have preferred not to reference them, like Italian and Portuguese lawmakers did.<sup>119</sup> In France, Article 1362 of the FrRLO published by the Catala Working Group, which is a group of scholars sponsored by the Henri Capitant Association, provides that:

Unless particular legislation is to the contrary, one who undertakes an abnormally dangerous activity, even lawfully, is bound to compensate any harm that ensues from that activity. Abnormally dangerous activities include those that create a risk of serious harm capable of affecting a large number of individuals simultaneously. One who undertakes such an activity may only discharge his liability by establishing the victim's fault.<sup>120</sup>

This new statement, which adopts "dangerous activity" as the criterion on which strict liability is based, is largely comparable with the first paragraph of Article 50 of the abandoned Swiss Draft Project (SwDP).<sup>121</sup> This provision states that the person who carries on a specifically hazardous activity is liable for the damage caused by the realization of the risk associated with the activity.<sup>122</sup> Article 50 of the SwDP does not allow the potentially liable person to escape liability by proving that he or she exercised all due care expected from a specialist in such activities.<sup>123</sup>

The newly adopted Turkish Code of Obligations (TurCO or *Türk Borçlar Kanunu*), which is partially derived from the SwDP<sup>124</sup> and which

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118. Monteiro & Veloso, *supra* note 70, at 181.

119. See van Boom & Pinna, *supra* note 79, at 269-70.

120. AVANT-PROJET DE REFORME DU DROIT DES OBLIGATIONS (ARTICLES 1101 À 1386 DU CODE CIVIL) ET DU DROIT DE LA PRESCRIPTION (ARTICLES 2234 À 2281 DU CODE CIVIL) [DRAFT REFORM OF THE LAW OF OBLIGATIONS (ARTICLES 1101 TO 1386 OF THE CIVIL CODE) AND OF THE LAW OF PRESCRIPTION (ARTICLES 2234 TO 2281 OF THE CIVIL CODE)] art. 1362, available at <http://www.henricapitant.org>.

121. Article 50(1) of the abandoned Swiss Draft Project (SwDP 1999) states: "If damage is caused by the realization of a risk characteristic to extrahazardous activity, the person conducting the activity is liable, even if it is allowed by law" (authors' translation).

122. *Id.*

123. See WIDMER & WESSNER, *supra* note 47, at 133.

124. It is worth mentioning that the SwDP has actually been abandoned by the Federal Council. See Press Release, Fed. Dep't of Justice and Police, Prolongation des délais de prescription en matière de responsabilité civile [Extension of Time Limits in the Field of Civil Liability]

took effect on July 1, 2012, offers an identical solution.<sup>125</sup> Unlike Article VI-3:206(5b) of the DCFR,<sup>126</sup> in the determination of his or her liability, Article 71 of the TurCO does not consider whether the person who carries the activity complied with statutory standards.<sup>127</sup> This solution also differs from that of Article 5:101(2) of the PETL, because Article 71 of the TurCO defines the dangerousness of the undertaking on the basis of the frequency or the seriousness of the risk that it causes without referring to notions like “foreseeable risk” or “common usage activity.”<sup>128</sup>

#### IV. REFLECTIONS

Considering this discussion, the following arguments can be made. First, there is no objective yardstick available for courts to assess the dangerousness of activities as such. Indeed, case law shows that courts are far from perfect risk assessors and that the tort law system typically brings cases to court that, surprisingly, do not involve the most dangerous activities. Second, the “common usage” criterion in strict liability for dangerous activities is impracticable. Third, “object” is preferable to “activity” as the central criterion. Fourth, the “abnormally dangerous object” criterion makes it necessary to adopt a dangerousness chart.

##### A. *Can Activities As Such Be Dangerous?*<sup>129</sup>

In a parallel way, European case law and national lawmakers have devised liability rules that co-exist with long-accepted concepts such as strict liability for road traffic accidents as well as with an ever-growing number of hybrid solutions, such as fault presumption, heightened duties of care, narrowed defenses, and so on.<sup>130</sup> On the whole, these

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(Jan. 21, 2009) (Switz.), available at <http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2009/2009-01-21.html>.

125. See Büyüksagis, *supra* note 43, at 67.

126. See DCFR, *supra* note 84, at 311 (Article VI.-3:206(5)(b)).

127. TÜRK BORÇLAR KANUNU [TURKISH CODE OF OBLIGATIONS] art. 71 (Turk.). For the translation in English of the Turkish Code of Obligations, see Erdem Büyüksagis, *Extracts from the New Turkish Code of Obligations*, 3 J. EUR. TORT L. 90 (2012).

128. For a criticism of Article 5:101(2) of the PETL, see WERRO, *supra* note 55, at 936; Erdem Büyüksagis, *De l'opportunité de préciser la portée d'une éventuelle clause générale de responsabilité pour risque* [The Opportunity to Clarify the Scope of Any General Clause of Liability for Risk], in RESPONSABILITÉ ET ASSURANCE [LIABILITY AND INSURANCE] 2 (2006) (discussing Swiss and European law).

129. In this Part, we extend the arguments put forward in Willem H. van Boom, *Inherent Risk and Organisational Design in European Tort Law*, 108 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT [JOURNAL OF COMPARATIVE LEGAL RESEARCH] 118, 131 (2009).

130. See the overview by CEES VAN DAM, EUROPEAN TORT LAW 141, 255 (2006).

judicial and legislative measures have reduced the importance of the fault principle while eliciting growing interest among academics in strict liability and controversial discussions, mainly about the uncertainty pertaining to the meaning and boundaries of strict liability.<sup>131</sup> This uncertainty becomes obvious when comparing various national tort systems in Europe.<sup>132</sup>

Indeed, the examples mentioned above show that the task of categorizing risks is no “walk in the park,” which has already been illustrated by the consequences of the “general clause” of liability for dangerous activities in the Portuguese and Italian legal systems.<sup>133</sup> Consider, for example, the list of activities that were and were not deemed dangerous under these legal systems<sup>134</sup>:

<b>Considered not dangerous</b>	<b>Considered dangerous</b>
<ul style="list-style-type: none"> <li>● Operating a water conduit</li> <li>● Operating an ATM</li> <li>● Plastering works</li> <li>● Operating aircrafts and trains</li> <li>● Trading gas liquids</li> </ul>	<ul style="list-style-type: none"> <li>● Operating a water conduit [sic]</li> <li>● Manufacturing medicines</li> <li>● Storing personal data</li> <li>● Hunting</li> <li>● Offering horse-riding lessons</li> <li>● Organizing a fireworks show</li> <li>● (Nuisance caused by) the use of a drilling hammer</li> <li>● Burning garden trash near a main road</li> <li>● A manufacturing process in which environmentally dangerous substances escape</li> </ul>

These examples show that it is difficult to firmly grasp the concept of risk and to rationally categorize activities appropriately. This task is even more difficult under those regimes that hold that the abnormality of the danger is assessed with regard to both the seriousness and the

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131. On which see recently BRÜGGEMEIER, *supra* note 16, at 96.

132. See Werro et al., *supra* note 11, at 3-4.

133. See *supra* Part III.B.

134. Examples are quoted by VON BAR, *supra* note 112, at 377-78.

likelihood of the damage resulting from the activity. In these law systems, the same category includes both minor accidents occurring with high frequency and catastrophic accidents occurring with low frequency.<sup>135</sup> Such a blending of two extremes is to be found in the PETL as well as in the aforementioned Austrian and Swiss Drafts and the newly adopted TurCO.<sup>136</sup>

Blending common and extraordinary events into a single liability regime puts the catastrophic explosion of an ammunition factory on a par with a traffic accident, although the nature of such accidents differs considerably. From a societal point of view, the events are incomparable: the causative mechanisms are distinct, the mass exposure is dissimilar, the consequences are totally different, and the insurability is incomparable. Therefore, placing these two extremes in the same category is not helpful, and the concept of “dangerous activities” is too vague,<sup>137</sup> and indeed may one day turn out to include activities such as providing French fries to the overweight or offering recreational activities to the unfit.<sup>138</sup>

The Tables below give some indication of the most important sources of health risk. Whatever quantitative approach one takes to tort law, obviously these data are merely illustrative.<sup>139</sup> Nevertheless, they may signal that tort law is not fully committed to the risks that society faces.

On the basis of these Tables, why is a motor vehicle considered to be a source of inherent danger, for example? Is it because statistics show that traffic is a major source of fatal accidents? This may be a correct

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135. See EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW—TEXT AND COMMENTARY, art. 5:101 § 2(b) (2005). Note that the French *Avant-projet* Catala does not blend these two opposites into one liability. Article 1362 of the Project concentrates on “*activités très risquées*,” catastrophic accidents affecting large numbers of persons (“*affecter un grand nombre de personnes*”).

136. See Büyüksagis, *supra* note 43, at 68.

137. In a similar vein, see Erdem Büyüksagis, *Die Haftung aus unerlaubter Handlung im Entwurf eines neuen türkischen Obligationenrechts* [Tort Liability in the Design of a New Turkish Code of Obligations], in HAFTUNG UND VERSICHERUNG [LIABILITY AND INSURANCE] 330, 333 (2006) (discussing Turkish law); Büyüksagis, *supra* note 128, at 5; Rudolf Reischauer, *Reform des Schadenersatzrechts? [Reform of Tort Law?]*, 24 ÖSTERREICHISCHE JURISTEN ZEITUNG [AUSTRIAN LAWYERS’ NEWSPAPER] 398 (2006); PETER CANE, ATYIAH’S ACCIDENTS, COMPENSATION AND THE LAW 105-06 (7th ed., 1999); SCHAMPS, *supra* note 2, at 848-49. *Contra* Peter Apathy, *Schadenersatzreform—Gefährdungshaftung und Unternehmerhaftung [Compensation Reform—Strict Liability and Liability of Contractors]*, 129 JURISTISCHE BLÄTTER [LEGAL SHEETS] 205, 209 (2007) (Austria).

138. See *infra* Table I and Table II.

139. Moreover, such Tables are time-limited in the sense that the calculations may vary with changing scientific and political insights into the true extent of certain risks.

TABLE I: (source: RIVM 2003)<sup>140</sup>

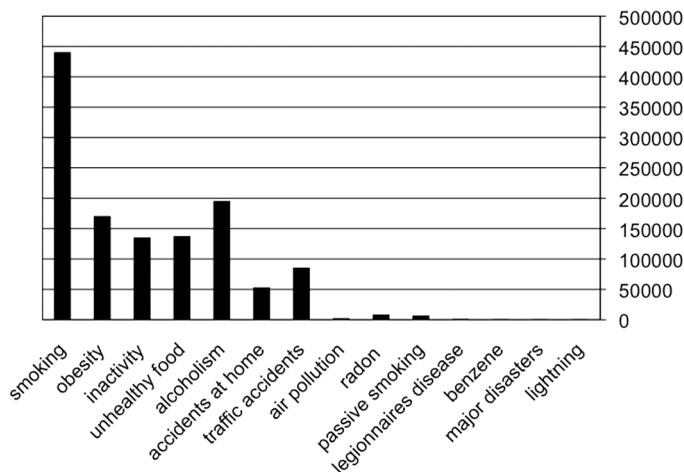
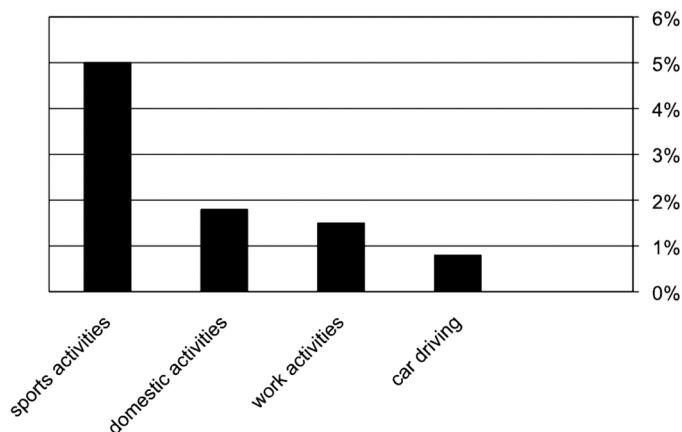


TABLE II: Percentage of people who have been injured over the last twelve months as a result of an accident (source: Swiss Federal Statistical Office 2007)<sup>141</sup>



answer, but it is also a dangerous one. Tort law, if it derives its risk categorization from statistics, may be addressing the wrong risks: the “exotic accidents” in which causation is easy to prove but which is a

140. MILIEU—EN NATUURPLANBUREAU RIJKSINSTITUUT VOOR VOLKSGEZONDHEID EN MILIEU [NETHERLANDS ENVIRONMENTAL ASSESSMENT AGENCY, EMPIRE INSTITUTE OF PUBLIC HEALTH AND THE ENVIRONMENT], NUCHTER OMGAAAN MET RISICOS [COPING RATIONALLY WITH RISKS] 17 (2003).

141. See *Accident Victims by Type of Accident and Treatment, in 2007*, HEALTH OF THE POPULATION—DATA, INDICATORS: ACCIDENTS, SWISS FEDERAL STATISTICAL OFFICE, <http://www.bfs.admin.ch/bfs/portal/en/index/themen/14/02/01/key/03.html> (last visited Feb. 23, 2013) (Switz.).

statistically insignificant event. In Switzerland, for example, practicing a sport is five times more dangerous than driving a car.<sup>142</sup> Naturally, the chain of cause and effect is stretched to an extreme in all of these cases, and the intermittent behavior of others (or possibly the victim himself) may be involved; however, from a statistical point of view, the risks in these cases are, for example, not different from those involving motor vehicles.

Note that we are not advocating inclusion or exclusion of these cases in a system of strict liability for dangerous activities. We merely point out that even in tort law policy, rationality demands risk categorization according to an objective benchmark. Such a categorization will necessitate reference to objective data, such as the number of lives at risk, the impact on society, or the seriousness of the injuries sustained. At present, such an objective method seems to be lacking in the legislative texts that take “dangerous activity” as a criterion.<sup>143</sup>

### B. *Common Usage: Impracticable Criterion*

Lawmakers who favor the “abnormally dangerous activity” criterion advocate that the more common the activity, the more likely its benefits affect a large part of the community.<sup>144</sup> Thus, according to them, strict liability is well justified when the risks of an activity are imposed on the public at large, while its benefits accrue to only a few.<sup>145</sup>

While an activity pursued by a large number of people will typically be a matter of common usage, the reverse is not necessarily true. Even if only a few people pursue an activity that carries with it a highly significant risk of harm, it may still be of common usage.<sup>146</sup> This is true, for example, for certain public utilities. The transmission of electricity through power lines or the transmission of gas through underground

142. See *supra* Table II.

143. See Erdem Büyüksagis, *Quelques réflexions sur l'euro-compatibilité des dispositions du Projet turc [Some Thoughts on the Euro-Compatibility of the Provisions of the Turkish Draft]*, in LA RESPONSABILITÉ CIVILE EUROPÉENNE DE DEMAIN: PROJETS DE REVISION NATIONAUX ET PRINCIPES EUROPÉENNES [EUROPEAN CIVIL LIABILITY OF TOMORROW: NATIONAL REVISION PROJECTS AND EUROPEAN PRINCIPLES] 129 (Bénédict Winiger ed., 2008) (discussing Turkish law).

144. See Charles E. Cantú, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402a of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning that Should Never Meet*, 35 AKRON L. REV. 33, 38-39 (2001); Elizabeth C. Price, *Toward a Unified Theory of Product Liability: Reviving the Causative Concept of Legal Fault*, 61 TENN. L. REV. 1277, 1303-04 (1994).

145. See OERTEL, *supra* note 1, at 24.

146. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 20 cmt. j (2010), which states that:

lines are typically provided by only a few companies, but will be considered an everyday activity falling under Article 5:101 (2b) of the PETL and, thus, outside the scope of the general clause for strict liability.<sup>147</sup>

The problem with such a policy is that it may be difficult to say whether the activity in question is a matter of common usage. For people living on islands or in coastal regions, where the likelihood of damage resulting from motorboat driving is significant, motorboat driving should be qualified as a common activity and not be subject to strict liability. For people living in the countryside, however, where the likelihood of a motorboat accident is not significant, motorboat driving does not qualify as a matter of common usage and would be subjected to strict liability. In such circumstances, it is hard to say that the dangerous activity criterion provides a coherent strict liability policy.

In Europe, Article 5:101(2b) of the PETL stresses that, to justify recourse to strict liability, the risk must be linked to an uncommon practice.<sup>148</sup> Thus, the authors of the PETL, influenced by the U.S. *Restatement (Third) of Torts*,<sup>149</sup> limited the scope of the general clause to exotic activities: in other words, uncommon activities.<sup>150</sup> According to § 20 of the U.S. *Restatement*, “an activity is plainly of common usage if it is carried out by a large fraction of the people in the community.”<sup>151</sup> Following the same approach as described by the *Restatement*, Professor Koch notes in his commentary on Article 5:101 of the PETL:

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Activities can be in common use even if they are engaged in by only a limited number of actors. Consider the company that transmits electricity through wires, or distributes gas through mains, to most buildings in the community. The activity itself is engaged in by only one party. Even so, electric wires and gas mains are pervasive within the community. Moreover, most people, though not themselves engaging in the activity, are connected to the activity; electric wires and gas mains reach their homes. Accordingly, the activity is obviously in common usage, and partly for that reason strict liability is not applicable.

147. Koch, *supra* note 3, at 106.

148. See EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY, art. 5:101 § 2(b) (2005).

149. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM, § 20 cmt. j (2010) (“[T]he more common the activity, the more likely it is that the activity’s benefits are distributed widely among the community; the appeal of strict liability for an activity is stronger when its risks are imposed on third parties while its benefits are concentrated among a few.”).

150. For a criticism of the “uncommon activity” criterion, see OERTEL, *supra* note 1, at 272; Kenneth W. Simons, *The Restatement (Third) of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines*, 44 WAKE FOREST L. REV. 1355, 1375-76 (2009).

151. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 20 cmt. j (2010).

[T]herefore, driving a motor car is certainly a matter of common usage, and for that reason falls outside the scope of this article—even though it may be subject to strict liability under national regimes—whereas transporting highly explosive chemicals in a huge tanker cannot be excluded by this provision.<sup>152</sup>

We believe that the “dangerous activity” criterion would unreasonably increase the scope of the general clause to the detriment of negligence liability,<sup>153</sup> whereas the “uncommon activity” criterion would considerably reduce it, thus defeating the aim of such a clause.<sup>154</sup>

C. “Objects” Rather Than “Activities” As a More Realistic Criterion

Instead of the “dangerous activity” criterion, would it not be better to adopt the “control of ultra-hazardous dangerous things” criterion as a foundation for strict liability? As a matter of fact, the judge-made law of many European countries expands the circumstances justifying strict liability because those who keep and/or use dangerous machines and substances place potential victims in a dangerous situation, while the victims do not subject the other to any risk (nonreciprocal risks).<sup>155</sup>

152. Koch, *supra* note 3, at 107; *see also* RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977); Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 614 (1999). For an example which supports this statement, see *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203, 1214 (E.D. Cal. 1976). In this case, the court held that the transport of bombs in a railroad car subjected the transporter to strict liability.

153. *See* Hein Kötz, *Empfiehl sich eine Vereinheitlichung und Zusammenfassung der gesetzlichen Vorschriften über die Gefährdungshaftung [It Is Advisable to Standardize and Summarize the Statutory Provisions on Strict Liability]*, in GUTACHTEN UND VORSCHLÄGE ZUR ÜBERARBEITUNG DES SCHULDRECHTS [OPINIONS AND SUGGESTIONS ON THE REVISION OF THE LAW OF OBLIGATIONS] 1796 (Bundesministerium der Justiz ed., 1981); CHRISTIAN VON BAR, *GEMEINEUROPÄISCHES DELIKTSRECHT, VOL. I: DIE KERNBEREICHE DES DELIKTSRECHTS [COMMON EUROPEAN TORT LAW, VOL. 1: THE CORE AREAS OF TORT LAW]* 129 (1996) (discussing European law).

154. *See* Büyüksagis, *supra* note 128, at 5; Franz Werro, *Les Principes de droit européen de la responsabilité civile en deux mots: contenu et critique [Principles of European Civil Liability in Two Words: Content and Critique]*, in RESPONSABILITÉ ET ASSURANCE [LIABILITY AND INSURANCE] 248, 250 (2005) (discussing European law); Boston, *supra* note 152, at 623-24; Simons, *supra* note 150, at 1376.

155. *See* Gerhard Wagner, *Strict Liability*, in MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 1607, 1609 (Jürgen Basedow et al. eds., 2012). The author states: “Time and again, scholars of comparative law have called for a general clause of strict liability for *keepers* of a source of danger . . .” *Id.* (emphasis added).

It is not a coincidence that, more than two centuries after the Industrial Revolution, the notion of “dangerous things in one’s care” still serves as the criterion to impose strict liability in the European Latin legal culture (e.g., Article 1384(1) of the FrCC),<sup>156</sup> whose rational character was favored by advocates of the rule of reason: a person should be liable for the harm caused by things which are under his or her care.<sup>157</sup>

Even in U.S. law, which makes explicit provisions for strict liability for abnormally dangerous activities, there are many cases in which it is held that one who, for his own purposes, keeps abnormally dangerous things is strictly liable to others for harm caused by them.<sup>158</sup> Consider the New Jersey Supreme Court case *Department of Environmental Protection v. Ventron Corp.*, which has regularly been quoted.<sup>159</sup> When considering the dangerousness of disposing of mercury-laden wastes, the court quoted reports to the U.S. Congress and academic papers recognizing that the disposal of toxic wastes could cause consequent environmental harms.<sup>160</sup> On the basis of the assessment of these authorities, the court concluded that “mercury and other toxic wastes are abnormally dangerous,” and that their disposal is an abnormally dangerous activity, even if the case in question does not include an activity as defined by § 520(c) of the *Restatement of the Law (Second)* or by § 20 of the *Restatement (Third)*.<sup>161</sup>

Under European and U.S. laws, the reason for the adoption of the “control of ultra-hazardous dangerous things” test is that it allows the strict liability doctrine to be more easily applied to cases in which there is no activity, but abnormally dangerous materials, substances, or emissions are involved.<sup>162</sup>

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156. CODE CIVIL [C. CIV.] art. 1384 (Fr.).

157. VINEY & JOURDAIN, *supra* note 91, § 675 at 729.

158. See, e.g., RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM § 20(a) (2010); RESTATEMENT (SECOND) OF TORTS § 520(c) (1977).

159. Dep’t of Env’t. Prot. v. Ventron Corp., 468 A.2d 150, 157 (N.J. 1983), *overruling* Marshall v. Wood, 38 N.J.L. 339 (N.J. Sup. Ct. 1876), *quoted in* Boston, *supra* note 152, at 651.

160. *Id.*

161. *Id.*

162. See Christine M. Beggs, Comment, *As Time Goes By: The Effect of Knowledge and the Passage of Time on the Abnormally Dangerous Activity Doctrine*, 21 HOFSTRA L. REV. 205, 214 (1992).

D. *Necessity of a Dangerousness Chart for Substances and Emissions*<sup>163</sup>

In a system based on the “control of ultra-hazardous dangerous things” criterion, charts describing the dangers linked to some substances (such as genetically modified organisms) or emissions (such as radioactivity) would provide necessary tools to practitioners by establishing scientific values for the probability of the occurrence and for the gravity of the risk. The person who uses dangerous substances or operates a dangerous installation that is subjected to strict liability would be warned, and thus would be more likely to take out insurance covering the risk in question.

Besides, in order to know whether he or she should rely on the general clause on strict liability or revert to negligence liability, the judge should be given the appropriate tools to determine whether the gravity of a specific type of accident and its frequency fall above or below a certain level. A model consisting of a general clause established in the civil code, as well as more detailed charts set out in various decrees, would allow the judge to accurately determine the risk level.

The Ordinance on Protection against Major Accidents, adopted by Swiss lawmakers in 1991 after an environmental disaster that occurred in Basel on November 1, 1986, is a good example of such a framework.<sup>164</sup> According to Article 1(1) of the Ordinance, the purpose of the Ordinance is to protect the public and the environment against the realization of serious risks.<sup>165</sup> Article 2(5) provides that the risk should be determined by the extent of the possible harm to the public or damage to the environment resulting from major accidents and the likelihood of their occurrence.<sup>166</sup> In its Annex, the Ordinance provides the threshold quantities for substances, preparations, or other objects such as special wastes. When, according to the data established by the Annex, there is a serious risk, the person keeping the dangerous object or the substance should comply with the principles of prevention set forth by Section 2 of the Ordinance.<sup>167</sup>

While aimed at protecting the public and the environment against serious harm or damage resulting from accidents, the Ordinance does

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163. In this Part, we extend the arguments put forward by Büyüksagis, *supra* note 128, at 4-5.

164. See SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] [SYSTEMATIC COLLECTION OF FEDERAL LAW] 814.012, translation available at [www.admin.ch/ch/e/rs/8/814.012.en.pdf](http://www.admin.ch/ch/e/rs/8/814.012.en.pdf).

165. *Id.* § 1, art. 1(1).

166. *Id.* § 1, art. 2(5).

167. See *id.* § 2, art. 3.

not establish *per se* liability rules for damages.<sup>168</sup> However, when the risk occurs, such a legislative framework would help the judge to determine whether the storage or use of the substance or object in question was dangerous, and whether the risk level in question is severe enough to hold the keeper strictly liable for the damage caused. It also would provide necessary tools to the judge to decide whether the keeper properly complied with his or her duties or deviated from the standard of care that certain statutes establish for particular situations. In many national laws in Europe, complying with the duties of care to protect the public from accidents does not allow the defendant to be relieved from strict liability. However, such conduct may be considered by the judge in the determination of the extent of the compensation provided for loss or damage incurred.<sup>169</sup>

It is worth adding that, when determining whether the gravity of an accident and its frequency fall above or below a certain level, the judge may use the data set up by a statute even for substances and objects that are beyond those specified by such a legislative framework, provided an analogy is possible.

We think that proceeding in such a way makes it possible to distinguish between danger and fantasy and contributes to establishing a legal security with respect to the application of strict liability.

## V. CONCLUSION

A general clause would provide greater clarity than the current piecemeal European method of slowly and intermittently expanding the limits of strict liability. Besides, such a clause would make strict liability a more manageable counterpart to standard negligence liability.

The substantial issue is what should be included in a general clause. In Europe, there are two main ways of formulating such a clause. One takes “abnormally dangerous activity” as the criterion establishing strict liability, while the other takes “dangerous objects.” The observations and analysis in this Article indicate that a coherent, practicable, and

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168. For an overview on the Ordinance on Protection against Major Accidents, see Felix K. Gmünder & Patrick Meyer, *Risk Considerations in the Domains of Protections Against Major Accidents in Comparison with Risk Control for Nuclear Power Plants*, in NUCLEAR ENERGY AGENCY, MANAGEMENT OF UNCERTAINTY IN SAFETY CASES AND THE ROLE OF RISK 97 (OECD ed., 2004).

169. In Swiss law, for instance, according to CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, art. 43(1) (Switz.), “the court determines the form and extent of the compensation provided for loss or damage incurred, with due regard to the circumstances and the degree of culpability” (authors’ translation).

sound strict liability policy needs to be attached to *objects rather than activities* for three main reasons. First, the concept of “dangerous activities” is too vague, and since there is no objective yardstick available for courts to assess the dangerousness of activities as such, the concept may one day evolve to include activities such as providing French Fries to the overweight or offering recreational activities to the unfit. Second, since the “abnormally dangerous activity” criterion is based on the idea that the more common the activity, the less justified the strict liability, the scope of a possible general clause is reduced to “exotic activities.” However, such a criterion is impracticable, impedes a coherent strict liability policy that would be beneficial to most victims, and goes against the aim of a general clause. Finally, European courts often hold someone strictly liable because the keeper and/or user of dangerous machines and substances places the victim in a dangerous situation, while the victim in turn presents no risk (nonreciprocal risks).

A system that is based on “dangerous objects” rather than “dangerous activity” as the central criterion for a general clause will work better, if it combines the general clause in primary legislation with more detailed non-exhaustive lists of dangerous substances, emissions and installations in secondary legislation. This solution would provide better guidance to both courts and persons working with such objects.